SBA No. 1112
BNSF/BMWE
Case No. 21
Award No. 22

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT

BURLINGTON NORTHERN/SANTA FE

CASE NO. 21
AND **AWARD NO. 22**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

On July 29, 1998 the Brotherhood of Maintenance of Way Employes ("Organization") and the Burlington Northern/Santa Fe ("Carrier") entered into an Agreement establishing a Special Board of Adjustment in accordance with the provisions of the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 1112 ("Board").

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed, suspended, or censured by the Carrier. Moreover, although the Board consists of three members, a Carrier Member, an Organization Member, and a Neutral Referee, awards of the Board only contain the signature of the Referee and they are final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

Employees in the Maintenance of Way craft or class who have been dismissed or suspended from the Carrier's service or who have been censured may choose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle his/her appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended, or censured may elect either option. However, upon such election that employee waives any rights to the other appeal procedure.

This Agreement further established that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of his/her desire for expedited handling of his/her appeal, the Carrier Member shall arrange to transmit one copy of the notice of the investigation, the transcript of the investigation, the notice of discipline and the disciplined employee's service record to the Referee. These documents constitute the record of the proceedings and are to be reviewed by the Referee.

The Agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified, or set aside, will determine whether ther was compliance with Schedule Rule 40; whether substantial evidence was adduced at the investigation to prove the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

In the instant case this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

BACKGROUND FACTS

Claimant has been employed by the Carrier since 1970 as a maintenance welder. Following notice of January 26, 2000 to attend a formal investigation, conducted on February 2, 2000, the Carrier suspended the Claimant for thirty (30) days for violation of Maintenance of Way Operating Rules 1.1.3 and 1.2.5, which read, in relevant part, as follows[1]:

Rule 1.1.3 Accidents, Injuries, and Defects

Report by the first means of communication any accidents, personal injuries...

Rule 1.2.5 Reporting

All cases of personal injury,..must be immediately reported...

FINDINGS AND OPINION

On August 20, 1999 while working as a welder the claimant stepped onto a sharp edge of a tie plate and experienced a twinge of pain the immediately subsided. Because the pain subsided he did not report the matter to any Carrier representative. The Claimant continued to work and continued his personal pursuit of playing recreational racquetball. In doing so, on or about December 1, 1999, he again experienced the pain in his foot. As a result he sought medical advice on or about December 18, 1999 at which time the physician prescribed that the pain was due to arthritis. The physician prescribed some anti-inflammatory drugs and casted the Claimant for orthotic shoe inserts. However, because the pain did not subside, and in fact worsened, the Claimant again sought

[1] At the hearing Safety rule S-1.5.3, Footing, was also read into the record. However, the notice of suspension does not cite to that rule and we do not regard it as a basis for the suspension.

medical advice. This time another physician diagnosed nerve damage and gave the Claimant a cortisone shot, instructing him that if the shot did not resolve the condition surgery would be necessary.

That same day the Claimant reported to the Carrier the physician's diagnosis, describing for the first time the events of August 20, 1999. In doing so he described how the injury occurred, the fact that he felt no pain for some thereafter, and the different diagnosis of the first doctor.

Thus, be cause the Claimant did not report the injury until that time, we are faced with the dilemma of deciding whether under these circumstances the thrity day suspension was arbitrary and/or excessive. After careful consideration we believe that it is. We so hold because when, as here, an employee suffers an injury, the significance of which is not discovered at the time of the event, he cannot be suspended for thirty days when he fails to report the injury. This is particularly true when the employee in question, again as is true here, has a long and unblemished record and one that is devoid of any similar occurrences from which we might be able to conclude that the employee does not, or will not, understand his obligation to work safely or to report the matter.

AWARD

The claim is sustained in accordance with the findings.

October 6, 2000

Robert Perkovich, Chairman and
Neutral Member, SBA No. 1112

DATED: October 6, 2000